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Citation for published item:

Brooks, Thom (2007) 'Between natural law and legal positivism : Dworkin and Hegel on legal theory.', Georgia State University law review., 23 (3). p. 7.

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3-1-2006

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BETWEEN NATURAL LAW AND LEGAL POSITIVISM: DWORKIN AND HEGEL ON LEGAL THEORY[†]

Thom Brooks *

INTRODUCTION

In *Law's Empire*, Ronald Dworkin says, "I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work."¹ Indeed, Dworkin very rarely mentions philosophers who may have influenced the development of his legal theory.² Perhaps surprisingly, there has been almost no prior attempt to uncover the philosophical debts of his legal theory,³ which is clearly one of the most significant

[†] This article was first presented at the 21st World Congress of the Internationalen Vereinigung für Rechts- und Sozialphilosophie at Lund University. The author is most grateful to Chris Bennett, Brian Bix, Fabian Freyenhagen, Ken Himma, Dudley Knowles, Richard Mullender, Bob Stern, and Leif Wenar for helpful comments on earlier drafts.

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1. RONALD DWORKIN, *LAW'S EMPIRE* ix (1986). [hereinafter DWORKIN, *LAW'S EMPIRE*]
2. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 411-12 n.15 (1986) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*] ("I am not a 'Kantian' . . . though I am very drawn to what I regard as the essential liberalism and egalitarianism of Kant's own theory."). Dworkin qualifiedly endorsed Jean-Jacques Rousseau's theory of the general will. See, e.g., THOM BROOKS, *Introduction to ROUSSEAU AND LAW* xvii-xx (2005); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 20 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*]. See generally, Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 1 (1995) [hereinafter Dworkin, *Constitutionalism and Democracy*].
3. See JULIE ALLARD, *DWORKIN ET KANT: REFLEXIONS SUR LE JUGEMENT* (2001); HARRY BROD, *HEGEL'S PHILOSOPHY OF POLITICS: IDEALISM, IDENTITY AND MODERNITY* 173 (1992) (arguing that Hegel and Dworkin share an "idealist" theory of law); Arthur J. Jacobson, *Hegel's Legal Plenum*, in *HEGEL AND LEGAL THEORY* 97-126 (Drucilla Cornell et al. eds., 1991) (arguing that only Dworkin and Hegel present "a jurisprudence of right"); see also THOM BROOKS, *Hegel's Ambiguous Contribution to Legal Theory*, in *RES PUBLICA* 85 (2004) (illustrating legal theorists' absence of attempt to trace Hegel's influence on Dworkin); ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY*, 145-74 (2d ed. 2003) (arguing Dworkin owes a particular debt to Roscoe Pound); Chad McCracken, *Hegel and the Autonomy of Contract Law*, 77 TEX. L. REV. 719, 719-51 (1999) (claiming affinities between Hegel and Lon Fuller). See generally STEPHEN GUEST, *RONALD DWORKIN* (2d ed. 1991); Richard Nordahl, *Rousseau in Dworkin: Judicial Rulings as*

contributions in the field since H. L. A. Hart's landmark *The Concept of Law*.⁴

In this article, this article will argue that—despite the absence of any clear influence of one theory on the other—the legal theories of Dworkin and Hegel share several similar and, at times, unique positions that join them together within a distinctive school of legal theory, sharing a middle position between natural law and legal positivism. In addition, each theory can help the other in addressing certain internal difficulties.

This article will not defend either Dworkin's or Hegel's legal theories, nor will it claim that Dworkin's and Hegel's legal theories are the same, which would make light of some major differences between them.⁵ Instead, this article will argue that Dworkin's theory can be understood as very much an extension of and, in certain respects, an improvement upon Hegel's theory. Moreover, this commonality between the two highlights a school of legal theory that may be called “*interpretivism*.”⁶

This new perspective will have implications for not only the history of legal theory but also for debates in contemporary jurisprudence more generally. Indeed, legal theorists have had great difficulty in coming to agreement on exactly to which jurisprudential tradition either Hegel or Dworkin belongs. For example, Hegel has

Expressions of the General Will, in 3 LEGAL THEORY 317-46 (1997); RICHARD DIEN WINFIELD, LAW IN CIVIL SOCIETY 123 (1995) (arguing that Dworkin and Hegel have diametrically opposed legal theories).

4. H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994).

5. See discussion *infra* Parts I-IV (claiming that not only Dworkin's and Hegel's theories occupy a similar space in between natural law and legal positivism).

6. DWORKIN, LAW'S EMPIRE, *supra* note 1, at vii (noting “*Interpretivism*” is more clearly associated with Dworkin's self-understanding of his legal theory: “[L]egal reasoning is an exercise in *constructive interpretation*, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.”) (emphasis added). See, e.g., JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY xiii, xv, 162 (2001) (describing Dworkin as an “interpretivist” or as employing “constructive interpretivism”); Jules L. Coleman, *Methodology in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 340 (Jules Coleman et al. eds., 2002) [hereinafter COLEMAN ET AL.]; Jon Mahoney, *Objectivity, Interpretation, and Rights: A Critique of Dworkin*, 23 L. & PHIL. 187, 187-222 (2004) (noting that Dworkin is a constructive interpretivist); Natalie Stoljar, *Survey Article: Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law*, 11 J. POL. PHIL. 485, 485 (2003) (explaining the legal theory of interpretivism).

been classified as a proponent of natural law,⁷ legal positivism,⁸ the historical school,⁹ a precursor of Marxist legal theory,¹⁰ post modern critical theory,¹¹ or even transcendental idealist legal theory.¹² Many scholars have considered Dworkin as “a special case” that resists easy classification.¹³ While sometimes characterized as a natural lawyer,¹⁴

7. See BROD, *supra* note 3, at 38, 79; TONY BURNS, NATURAL LAW AND POLITICAL IDEOLOGY IN THE PHILOSOPHY OF HEGEL (1996); DUDLEY KNOWLES, HEGEL AND THE PHILOSOPHY OF RIGHT 128 (2002) (claiming Hegel held a non-traditional understanding of natural law); GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 114-15 (4th ed. 1972); Terry Pinkard, *Constitutionalism, Politics and the Common Life*, in HEGEL RECONSIDERED: BEYOND METAPHYSICS AND THE AUTHORITARIAN STATE 176-77 (H. Tristram Engelhardt, Jr., & Terry Pinkard eds., 1994) [hereinafter ENGELHARDT & PINKARD]; H.A. Rommen, *In Defense of Natural Law*, in LAW AND PHILOSOPHY 116 (Sidney Hook ed., 1964); Kevin Thompson, *Institutional Normativity: The Positivity of Right*, in BEYOND LIBERALISM AND COMMUNITARIANISM 42 (Robert R. Williams ed., 2001); Ernest J. Weinrib, *Legal Formalism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 338 (Dennis Patterson ed., 1996) [hereinafter PATTERSON]. But see ROBERT R. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION 94-96 (1997) (arguing that Hegel critiqued natural law rather than espousing it).

8. See 2 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 41 (5th ed. 1966); see, e.g., *id.* at 66, 395.

9. See L. B. CURZON, JURISPRUDENCE 179 (3d ed. 1996); GIORGIO DEL VECCHIO, PHILOSOPHY OF LAW 123, 125-29 (8th ed. 1952); R. W. M. DIAS, JURISPRUDENCE 384-85 (5th ed. 1985); M. D. A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 783-85 (6th ed. 1994) (arguing that Hegel was a member of the Romantic Movement, which was based on a profound attachment to the organic roots of society); PATON, *supra* note 7, at 114-15.

10. See CURZON, *supra* note 9, at 212; FREEMAN, *supra* note 9, at 838-40, 853.

11. See Costa Douzinas, *Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?*, 29 J. L. & SOC. 379, 379-405 (2002); Michael Salter & Julia A. Shaw, *Towards a Critical Theory of Constitutional Law: Hegel's Contribution*, 21 J. L. & SOC. 464, 464-86 (1994) (arguing how Hegel distinguishes his theory from natural law, which refines or influences post modern legal theory).

12. See CURZON, *supra* note 9, at 110-16; see, e.g., Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 851 (1995) (claiming that while Hegel's legal thought may be appealing to postmodernists, “Hegel's ultimate position remains deeply ambiguous”).

13. Jules L. Coleman & Brian Leiter, *Legal Positivism* in PATTERSON, *supra* note 7, at 242; see *id.* at 249-52, 255-56 [hereinafter Coleman & Leiter]; Edward Chase, *Law and Theology*, in PATTERSON, *supra* note 7, at 422-23, 425 (classifying Dworkin as an anti-positivist); COLEMAN ET AL., *supra* note 6, at 159 (noting Dworkin's position is distinctive); John Mackie, *The Third Theory of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161-70 (Marshall Cohen ed., 1984) [hereinafter COHEN] (claiming Dworkin's theory is “the third theory of law” between natural law and positivism); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 23, 239 (1990) [hereinafter POSNER, PROBLEMS OF JURISPRUDENCE] (characterizing Dworkin as both a natural law proponent and a legal positivist); Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 162-63 (Robert P. George ed., 1992). Compare Brian H. Bix, *Natural Law: The Modern Tradition*, in COLEMAN ET AL., *supra* note 6, at 83 (arguing that Dworkin could be a natural theorist), with C. L. TEN, *The Soundest Theory of Law*, 88 MIND 522 (1979) (claiming that Dworkin's theory is a less acceptable variant of legal positivism).

14. See Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 234-37; Brian H. Bix, *Natural Law*, in COLEMAN ET AL., *supra* note 6, at 66; DIAS, *supra* note 9, at 501-02; Ronald Dworkin, *Law and Morals*, in THE OXFORD COMPANION TO PHILOSOPHY 474 (Ted Honderich ed., 1995) [hereinafter Dworkin, *Law and Morals*] (indicating that Dworkin holds views contrary to legal

Dworkin rejects this claim and is often discussed under general headings such as “normative approaches to law,” “integrity,” or “rights.”¹⁵ Recognizing both Hegel and Dworkin as proponents of a position lying in between natural law and legal positivist jurisprudence clarifies why their general legal theories seem to fit uncomfortably, if indeed they can said to “fit” at all, within so many different camps—while fitting comfortably within no particular camp—as well as highlights what has been overlooked.

This article will begin with a discussion of how Hegel and Dworkin can be thought to hold theories in between natural law and legal positivism and then consider specific features of their theories. Second, this article will examine how they each conceive the relationship between law and morality. Third, it will discuss their views on the immanent development of law into justice. Fourth, the role of democratic institutions and how this relates to the legal theories of each is considered. This article concludes with a note on problems and prospects for their “in between” positions on law.

positivism); FREEMAN, *supra* note 9, at 89-90; Kenneth Einar Himma, *Inclusive Legal Positivism*, in COLEMAN ET AL., *supra* note 6, at 141 (calling Dworkin an anti-positivist); D. N. MacCormick, *Dworkin as a Pre-Benthamite*, 87 PHIL. REV. 585, 589 (1978); NEIL MACCORMICK, *LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY* 131 (1982); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 96, 117 (1999) [hereinafter POSNER, *PROBLEMATICS OF MORAL AND LEGAL THEORY*]; Joseph Raz, *The Purity of the Pure Theory*, in FREEMAN, *supra* note 9, at 329-30; Rolf Sartorius, *Dworkin on Rights and Utilitarianism*, in COHEN, *supra* note 13, at 205 (noting Dworkin's theory of adjudication has anti-positivist implications); E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, in COHEN, *supra* note 13, at 21 (calling Dworkin a non-positivist); Jeremy Waldron, *Legal and Political Philosophy*, in COLEMAN ET AL., *supra* note 6, at 356 (characterizing Dworkin as an anti-positivist); ERNEST J. WEINREB, *NATURAL LAW AND JUSTICE* 118, 121 (1987); Kenneth Einar Himma, *Situating Dworkin: The Logical Space between Logical Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41 (2002) (noting that Dworkin was legal positivism's most influential critic); Stephanie R. Lewis, *Taking Adjudication Seriously*, 58 AUS J. PHIL. 377, 384-85 (1980); Nordahl, *supra* note 3, at 332 n.66.

15. See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 81-92 (2d ed. 1999); COTTERRELL, *supra* note 3, at 145-47, 160-74; KEITH C. CULVER, *READINGS IN THE PHILOSOPHY OF LAW* 179-242 (1999); CURZON, *supra* note 9, at 295-301, 306, 308-15; Neil Duxbury, *Post-Realism and Legal Process*, in PATTERSON, *supra* note 7, at 300 (calling Dworkin a member of the “legal process” tradition); FREEMAN, *supra* note 9, at 18 n.23, 339, 341-43, 354-55, 382-85, 1270-83.

I. BETWEEN NATURAL LAW AND LEGAL POSITIVISM

This article's central claim is that both Hegel's and Dworkin's legal theories can be located in between natural law and legal positivism. Before moving to a discussion of their particular views, it is necessary to explain the position between natural law and positivism. Hegel and Dworkin can be understood as being part of *both* the traditions of natural law and positivism. There is also a sense in which their theories do not appear to belong to *either* tradition. As they each have a foot in both traditions, but do not sit comfortably in either, Hegel's and Dworkin's theories fall somewhere in between natural law and positivism as opposed to being located among other legal traditions.

A. *Natural Law*

To begin, perhaps the classic statement of natural law is found in Cicero's *De Re Publica*.¹⁶ Cicero says:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . [T]here will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all,

16. The natural law tradition, like many other major schools of thought, is a wide tent inclusive of a number of general characteristics. This article cannot discuss every property ascribed to natural law theories because of the large number of major figures and philosophical positions that would deserve discussion and become chapters unto themselves. Rather, it highlights those central features of perhaps all natural law theories. See, e.g., Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 223-40 (discussing natural law in general); Brian Bix, *Natural Law*, in COLEMAN ET. AL., *supra* note 6, at 61-103; FREEMAN, *supra* note 9, at 89-203.

for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishments.¹⁷

In this passage, Cicero notes several features distinctive to traditional natural law theories. First, only “true” laws, which are fully consistent with justice, are “law” properly so-called.¹⁸ Certain positive laws embody various degrees of (true) law insofar as they embody certain moral standards. Thus, *lex iniusta non est lex* (“an unjust law is not law”).¹⁹

Second, a standpoint outside of the law, such as “justice,” can be used to ascertain the degree to which law is consistent with justice.²⁰ In other words, the standard by which we assess the degree to which any given positive law is commensurate with justice is itself a standard external to positive law. A law that is more consistent with justice is more substantively “law” than another law which is not: all positive laws do not have the same status by virtue of being positive laws.²¹ For Cicero, God sets this standard.²² This position is similar to that held by most traditional natural lawyers, including Augustine and Aquinas.²³ More contemporary natural law proponents have claimed that, in Cicero’s words, only “right reason” serves as a proper assessment of law’s consistency with morality, rather than the

17. FREEMAN, *supra* note 9, at 130-31; see Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 224.

18. Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 224.

19. Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 226 (ascribing this phrase to Aquinas but recognizing that it is a tenet of the natural law position in general).

20. See Torben Spaak, *Legal Positivism, Law’s Normativity, and the Normative Force of Legal Justification*, 16 *RATIO JURIS* 469, 471 (2003).

21. See Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 225-27 (noting that traditional natural law theory recognizes that just laws are consistent with the requirements of natural law but some laws promulgated by government may be inconsistent with principles of natural law and are therefore unjust).

22. See *supra* note 17 and accompanying text.

23. See FREEMAN, *supra* note 9, at 132-33.

word of God.²⁴ As a result, the existence (or non-existence) of God is no longer a factor in modern natural law theorizing. Third, and finally, what right reason prescribes as a standard of law is fixed; it does not change over time and it is the same for all people.²⁵

1. *Dworkin, Hegel, and Natural Law*

The legal theories of Hegel and Dworkin may, in fact, seem like natural law theories.²⁶ Both claim that there is a necessary link between law and morality. That is, law is itself inherently normative. For Dworkin, “jurisprudential issues are at their core issues of moral principle.”²⁷ Elsewhere, he speaks of the need to bring “morality into the heart of constitutional law,” theorizing in a “moral reading” of law.²⁸ The problem, in Dworkin’s view, is that contemporary theorists, particularly legal positivists, have overlooked the inherent normative nature of positive law.²⁹ Hegel argues that moral norms “are expressed as [just] [l]aws.”³⁰ Indeed, any proper understanding of positive laws must be grounded in morality.³¹ That is, morality and

24. See Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 227 (noting that from the Renaissance period to the modern day, natural law writings have been “secular in tone and purpose”).

25. See Spaak, *supra* note 20, at 471.

26. Dworkin does not typically refer to his legal theory as belonging to the natural law tradition, albeit in one lecture. See, e.g., Ronald Dworkin, “*Natural*” *Law Revisited*, 34 U. FLA. L. REV. 165 (1982) (“If the crude description of natural law I just gave is correct, that any theory that makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.”).

27. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 7 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

28. DWORKIN, *FREEDOM’S LAW*, *supra* note 2, at 2.

29. *Id.*

30. G. W. F. HEGEL, *THE PHILOSOPHY OF HISTORY* 111 (1956) [hereinafter HEGEL, *THE PHILOSOPHY OF HISTORY*].

31. See e.g., 7 G. W. F. HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* §§ 105-41 (H. B. Nisbet, trans., 1970) (showing that for Hegel, legal right is grounded in and supersedes “morality [*Moralität*]”). Unless stated otherwise, all English translations will be from G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (1991) [hereinafter HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*]. Remarks will be noted by “R” and additions by “A” following the appropriate paragraph number.

positive law are not wholly independent.³² Thus, both Dworkin and Hegel seem to agree with one major aspect of natural law theories.³³

2. *Dworkin and Hegel on Law and Justice*

A second important aspect of natural law theories is the distinction between “law” and “justice.”³⁴ Law is best evaluated by how well it coheres with morality.³⁵ Wicked or unjust laws are laws inconsistent with morality. Both Hegel and Dworkin agree with this concept as well.

Hegel argues, “[W]hat is law [*Gesetz*] may differ in content from what is right in itself [*an sich Recht*].”³⁶ In his view, slavery may be legally valid and yet unjust.³⁷ Law becomes more consistent with justice insofar as law is a “realization [*Verwirklichung*]” of “right [*Recht*],” that is, insofar as law embodies right.³⁸ Hegel often plays upon the ambiguity of the German word for right, *Recht*. *Recht* can mean right in a legal sense, as in having the right to do something, or right as a form of justice, as in to be in the right. *Recht* can also refer to law, although Hegel uses the word *Gesetz* as well, which can be translated as “law” or “statute.” He does not use the words interchangeably, instead tending to use *Gesetz* for positive law and *Recht* for a normative sense of positive law, such as justice.³⁹ The

32. See *infra* notes 53-58 and accompanying text (discussing how as a result of this independence, both Dworkin and Hegel violate “the separability thesis” of legal positivism: that law and morality are strictly separable).

33. See, e.g., Brian Bix, *Natural Law*, in COLEMAN ET AL., *supra* note 6, at 66. (showing for Bix, Dworkin should be considered a member of the natural law camp insofar as he denies the strict separation of law and morality).

34. See *infra* notes 67-69 and accompanying text.

35. See, e.g., Brian Bix, *Natural Law*, in COLEMAN ET AL., *supra* note 6, at 98-99.

36. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 212.

37. SEE G. W. F. HEGEL, LECTURES ON NATURAL RIGHT AND POLITICAL SCIENCE: THE FIRST PHILOSOPHY OF RIGHT § 8R (1995) [hereinafter HEGEL, LECTURES]; see also HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 99. Of course, legal positivists need not reject this view of slavery as legally valid, yet unjust, as positivism is a theory about the nature of law—law’s validity—rather than the evaluation of law—whether the law is just or unjust. See, e.g., *infra* notes 45-51 and accompanying text.

38. G. W. F. HEGEL, PHILOSOPHY OF MIND § 529 (1971) (translation modified) [hereinafter HEGEL, PHILOSOPHY OF MIND].

39. See, e.g., HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 211 (noting that Hegel enjoyed “exploiting the etymological affinity of words to suggest a semantic affinity. In this case, the noun *Gesetz* (‘law’) echoes the verb *gesetzt* (‘posited’).”). Thus, in his native German language,

two come together when Hegel says that “actual legal relationships presuppose laws founded on right [*Rechtsgesetz*] as something valid in and for itself.”⁴⁰ *Gesetz* is distinguishable from *Rechtsgesetz* in that only the latter represents positive law fully consistent with justice. All other varieties of positive laws [*Gesetze*] embody lesser forms of right [*Recht*].

Dworkin likewise makes a distinction between law and justice. In *Law's Empire*, he says:

Law is also different from justice. Justice is a matter of the correct or best theory of moral and political rights Law is a matter of which *supposed* rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past.⁴¹

Here, he claims that law's status is more fragile than that of justice, as what serves as law is only “supposed.” Both law and justice relate to rights, although justice has a superior relationship—indeed, the “best” relationship—to rights than law has. In this way, Dworkin's view, that law that best captures the substance of rights is justice, is similar to Hegel's view.⁴²

A third significant, general aspect of natural law theories is that the notion of justice is fixed and eternal.⁴³ That is, what serves as the standard for justice today will serve in the future as well. This is where Hegel and Dworkin begin to part company with the school of natural law. Neither can accept this aspect in their theories of law. In fact, Hegel even says: “[a] perfect, fully complete code of laws is an unattainable ideal; rather it must be continually improved.”⁴⁴

Hegel found something profound about this particular relationship, as in his views all laws are always posited until law becomes commensurate with actual right, or justice. For this reason, the fact that *Gesetz* and *gesetzt* share an etymological affinity is no accident in Hegel's eyes. *See id.*

40. HEGEL, LECTURES, *supra* note 37, § 109 (emphasis omitted).

41. DWORKIN, LAW'S EMPIRE, *supra* note 1, at 97 (emphasis added).

42. Compare *id.*, with HEGEL, PHILOSOPHY OF MIND, *supra* note 38, § 529.

43. See Spaak, *supra* note 20, at 471.

44. HEGEL, LECTURES, *supra* note 37, § 109R.

B. Dworkin, Hegel, and Legal Positivism

Another respect in which Hegel and Dworkin depart from natural law theories is that both claim that the study and theorizing of law should primarily concern actual positive laws, rather than factors or moral norms that are external to the law. This line of thought forms one important aspect of legal positivism.⁴⁵ Stated piquantly by John Austin, positivism holds that “[t]he matter of jurisprudence is positive law: law, simply and strictly so called”⁴⁶ Law serves as the primary focus of theorizing for Hegel and Dworkin as well. For example, Hegel says that “what is *legal* [*gesetzmäßig*] is . . . the source of cognition of what is *right* [*Recht*], or more precisely, of what is *lawful* [*Rechters*].”⁴⁷ Our knowledge of right is obtained from nowhere other than what serves as positive law.

Likewise, Dworkin argues that judges should not render legal judgments based upon just any moral considerations.⁴⁸ Instead, proper legal interpretation, understood as “law as integrity,” entails that “the grounds of law lie in integrity, in the best constructive interpretation of past legal decisions.”⁴⁹ That is, jurisprudence is concerned first and foremost with understanding law as law, rather than primarily concerned with evaluating law from an external standpoint. This is certainly not to say that Dworkin (and Hegel) do not evaluate law. But their methods of evaluation cohere at least minimally insofar as they discuss principles that “underlie” and are “embedded in” “the positive rules of law,” rather than principles that exist outside the legal system.⁵⁰ In this sense, both Hegel and

45. As with natural law, the tradition of legal positivism is a wide tent as well. The comments offered here on positivism do not touch on each and every characteristic that has been ascribed to it. Instead, this article only seeks to highlight the ways in which Hegel and Dworkin can be thought to relate to positivism. See generally Coleman & Leiter, *supra* note 13, at 241-60 (discussing legal positivism more robustly); FREEMAN, *supra* note 9, at 205-69, 344-56, 393-433.

46. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE AND THE USES OF THE STUDY OF JURISPRUDENCE 9 (1954).

47. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 212R.

48. See, e.g., DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 37 (stating that judges should never rely on their “own preferences amongst a sea of respectable extra-legal standards”). Of course, many natural lawyers would agree with this point as well.

49. DWORKIN, LAW’S EMPIRE, *supra* note 2, at 262.

50. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 105.

Dworkin's legal theories relate to legal positivism and certainly differ from the evaluative strategies of natural law proponents.⁵¹

Despite sharing this characteristic with most proponents of legal positivism, Hegel and Dworkin differ from positivism in an important respect by believing there is a necessary link between law and morality.⁵² They deny a fundamental tenet of positivism, namely, "the separability thesis." This thesis states that law and morality always *can* diverge, not that they always *must* diverge.⁵³ The classic statement of the thesis is from Austin. He says:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation.⁵⁴

In Austin's view, it makes no sense to speak of any positive law as being substantively "more" law than another law. Yet, for Hegel and Dworkin, this can make sense if law is understood as embodying a normative dimension to a greater or lesser extent. The more law embodies morality, the closer it coheres with justice.⁵⁵ This difference between Austin's position and the general position shared by Hegel and Dworkin highlights how the latter position differs from legal positivism. For legal positivists, such as Austin, the validity of

51. See FREEMAN, *supra* note 9, at 130-33 (noting that Cicero evaluates law by its relation to God's will); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 81-94 (1980) (providing a list of seven "basic forms of good" from which to evaluate law); LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed., 1969) (arguing that we should evaluate law via eight institutional features, such as publicity of law and the absence of retroactive legislation). See generally JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY (1998) (noting Aquinas evaluates law by its relation to God's will).

52. See *supra* notes 26-31 and accompanying text.

53. See generally MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS (1999) (providing a robust defence of the separability thesis as a central plank of legal positivism).

54. AUSTIN, *supra* note 46, at 184.

55. See *supra* notes 26-31 and accompanying text.

law is a social fact, discerned without appeal to moral principle.⁵⁶ For natural lawyers, such as Cicero, one must refer to moral principles external to the law in order to discover what laws are valid.⁵⁷

It is important to note that there are respects in which Hegel's and Dworkin's views on law cohere with the natural law tradition: they reject the separability thesis and they argue there is a necessary link between law and morality. Unlike some proponents of natural law, neither theorist takes justice to be eternally fixed. Moreover, in keeping with legal positivists, Hegel and Dworkin believe that standards internal to law are the only standards primarily relevant in evaluating law.⁵⁸ As a result, they *both* adopt *and* reject major planks of natural law and legal positivism. Their legal theories do not sit comfortably in either camp but instead reside somewhere in between natural law and positivism.

II. THE RELATION BETWEEN THE JURISPRUDENCE OF HEGEL AND DWORKIN

Now that Hegel's and Dworkin's legal theories can generally be thought to fit between natural law and legal positivism, specific features of their legal theories can be considered. A central component of Hegel's legal theory is that the development of law's normative content is at the heart of the full development of right.⁵⁹ For example, better-developed law possesses substantively richer normative content that better approximates justice.⁶⁰ In this respect, the manner in which Hegel's theory employs normativity in understanding legal development may seem consistent with the

56. See AUSTIN, *supra* note 46, at 185 ("Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense.").

57. See *supra* note 17 and accompanying text.

58. A further difference between Hegel and Dworkin with legal positivism is that positivism is a theory about the evaluation of law, not the nature of law. Hegel's and Dworkin's legal theories are theories about the nature of law and its evaluation, bringing these two features together.

59. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, § 212.

60. See Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 225-27.

general approach of natural lawyers, as discussed in the previous section.⁶¹

Dworkin takes a slightly different approach, as he is far keener to distinguish his legal theory from natural law jurisprudence.⁶² He argues that the ideal judge “is not a historicist, but neither is his the buccaneer style sometimes lampooned under the epithet ‘natural law’ [sic] He does not think the Constitution is only what the best theory of abstract justice and fairness would produce by way of ideal theory.”⁶³ Already basic similarities between Hegel and Dworkin’s views on legal theory are evident.⁶⁴ For example, Dworkin argues that our point of reference when thinking about improving law is not an end point or particular goal. Rather, our point of reference is the positive law. As Dworkin argues: “all law . . . is anchored in history, practice, and integrity.”⁶⁵ This statement is similar to Hegel’s argument that law’s normative content is central to developing law and attaining justice.⁶⁶

A. *Dworkin on Law and Morality*

This article will shortly discuss whether Dworkin’s legal theory accepts (or should accept) Hegel’s use of normative content. But it is important first to recognize that Hegel’s and Dworkin’s theories employ closely related distinctions. For instance, each distinguishes between positive law and justice. Dworkin defines justice as “a

61. G. W. F. HEGEL, *On the Scientific Ways of Treating Natural Law*, in G. W. F. HEGEL, *POLITICAL WRITINGS* 163 (1999) [hereinafter HEGEL, *POLITICAL WRITINGS*]; see, e.g., HEGEL, *THE PHILOSOPHY OF HISTORY*, *supra* note 30, at 41 (“To the Ideal of Freedom, Law and Morality are indispensably requisite . . .”); *id.* at 163, 289.

62. See Dworkin, *Law and Morals*, *supra* note 14, at 474 (explaining how Dworkin distinguishes his views from natural law: “[T]here is often a gap between what the law is and what [natural lawyers] believe it should be.”). Yet, this distinction is rather hollow, as natural lawyers seem generally to recognize this gap as well.

63. DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at 397.

64. Despite the similarities, one major apparent difference between the two is that, to Hegel, the need to limit subjective arbitrariness and increase individual freedom fuels legal development. See *infra* Part IV.

65. DWORKIN, *FREEDOM’S LAW*, *supra* note 2, at 11; see also DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at vii (“[O]ur law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.”).

66. See *supra* note 59 and accompanying text.

matter of the correct or best theory of moral and political rights.”⁶⁷ He recognizes that justice and law should ultimately be unified, and that they also come apart and are not always the same thing.⁶⁸ That Hegel and Dworkin distinguish between “law” and “justice” is not particularly significant, as all natural lawyers would make the same distinction.⁶⁹ What is significant about Hegel’s and Dworkin’s distinction is how law and justice relate within an immanent development of law. Such a view of law and justice is unique and not a feature of either natural law or legal positivism (nor is this view a feature of other schools of jurisprudence such as legal realism, pure law theory, or legal pragmatism). The next section focuses on this development.⁷⁰

For Dworkin, law and morality share an *interdependent* existence. That is, we may not be morally blameworthy each and every time we transgress a law, as the law may be “so unfair or unjust that the normal moral obligation to obey the law [is] lapsed.”⁷¹ Indeed, he adds, “[n]o one thinks that the law as it stands is perfectly just.”⁷² Thus, the legitimacy of the positive law is not an entirely separate matter from its moral force.

Some legal theorists might hesitate to attribute such a view to Dworkin’s theory, following Jules Coleman and Brian Leiter: “Dworkin does not claim that the validity of legal principles depends on their morality, but he does believe that in *interpreting* the meaning of valid legal rules it is often necessary to consult moral principles.”⁷³ However, agreement with this statement requires recognizing Dworkin’s understanding of morality. In his view, morality is not considered independently from the legal system. Rather, morality emerges from within the legal system: certain moral principles are

67. DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at 97.

68. See Dworkin, *Law and Morals*, *supra* note 14, at 474.

69. Brian Bix, *Natural Law Theory*, in PATTERSON, *supra* note 7, at 225-27.

70. The author thanks Ken Himma for pushing him on this point.

71. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 9.

72. *Id.* at 89.

73. Coleman & Leiter, *Legal Positivism*, *supra* note 13, at 242. Here Coleman and Leiter attribute an important aspect of legal positivism—that the validity of law is a social fact—to Dworkin’s legal theory. This article disagrees with their view that, for Dworkin, law does not depend on morality for its validity. As the following section discusses, Dworkin holds that law is inherently normative. See *infra* Part III.

embedded in our positive laws.⁷⁴ These moral principles are best understood as underlying a community's institutions and laws.⁷⁵ For this reason, the only appropriate use of morality in legal theorizing is in appeals to moral principles internally consistent with our positive laws. As a result, morality emerges from within law as a major factor in the progressive development of law toward justice. In fact, Dworkin claims his legal theory can bring "morality into the heart of constitutional law."⁷⁶

This situation happens most often when positive laws either conflict or do not establish a clear legal rule. In such cases, we should look for *principles* of morality that are *embedded* in law to help us determine verdicts.⁷⁷ We should not look for moral principles lying elsewhere to guide us. Moreover, by applying moral principles in this way, laws are increasingly justified by their improved normative force: that is, positive law becomes more commensurate with justice through application of morality.⁷⁸ Finally, justice is not a mere ideal, but can only exist instantiated to varying degrees as particular laws. This interrelation is at least superficially akin to what we have seen with Hegel above.⁷⁹

Nevertheless, the correspondence between Hegel's and Dworkin's legal theories highlighted here may still appear to be little more than a vague similarity or suggestion. This may be because while Dworkin does not deny that law and morality are interrelated, he does deny that this morality exists outside of law.⁸⁰ Rather, law's normative

74. DWORKIN, FREEDOM'S LAW, *supra* note 2, at 11 (emphasis added); see DWORKIN, LAW'S EMPIRE, *supra* note 1, at 243.

75. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 79; see, e.g., *id.* at 209-10.

76. DWORKIN, FREEDOM'S LAW, *supra* note 2, at 2.

77. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 22.

Most often I shall use the term 'principle' generically, to refer to the whole set of these standards other than rules . . . I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of *morality*.

Id. (emphasis added).

78. See WEINREB, *supra* note 14, at 120 (noting that a judge who does what Dworkin suggests "will find that law and political morality lead to the same result").

79. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 3R; see, e.g., HEGEL, POLITICAL WRITINGS, *supra* note 61, at 2.

80. See *supra* note 76 and accompanying text.

moral content develops only immanently within the law itself. That is, moral principles lying outside law or inactive within a given legal tradition should not be appealed to when interpreting laws within that tradition. For example, he argues that a legal system governs through the pieces of legislation passed by lawmakers as well as the moral principles inherent—explicitly or not—in such legislation.⁸¹ Therefore, moral principles that are not active in legislation have no distinct legal application. Such principles may be employed in ascertaining how our positive laws can progressively improve, on the grounds that doing this would involve bringing *non*-legal measures into judicial interpretation. Dworkin says of his “moral reading” of law:

The moral reading asks them [i.e., judges] to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America’s historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record.⁸²

For Dworkin, legal systems implicitly contain certain moral principles. More importantly, acknowledging and employing these principles helps refine our laws in keeping with an improved notion of what justice entails for our legal system.⁸³

B. Hegel’s and Dworkin’s Similar Use of Normative Evaluation

Dworkin’s position on the relationship between law and morality is strikingly similar to Hegel’s position. This article will now examine three important features of their legal theories held in common. First,

81. DWORKIN, FREEDOM’S LAW, *supra* note 2, at 10.

82. *Id.* at 11; *see, e.g.*, Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 6-9 (noting that a moral reading of law does not necessitate the conclusion that judges are legislating; rather it acknowledges that there may be right answers to controversial constitutional questions).

83. *See, e.g.*, DWORKIN, FREEDOM’S LAW, *supra* note 2, at 2.

both Dworkin and Hegel share a similar use of normative evaluation. Secondly, each denies the existence of extra-legal normative content. Thirdly, Dworkin's understanding of equal concern and respect for all persons maps on well with Hegel's understanding of normative content.

This article has spoken of "development," "progress," and "improvement" throughout its discussion of Hegel's and Dworkin's legal theories. It should be clear that both Hegel and Dworkin hold that positive law can undergo a progressive development.⁸⁴ More interestingly, each argues that we should chart progress through a kind of "immanent critique." Robert Stern presents clearly how an immanent critique might provide us with a sense of progressive development. He says:

[W]e can use here an 'internal' notion of rationality, whereby it is rational to change from one outlook or theory to another *not* because the latter possesses the transcendental predicate of 'truth' or 'absolute validity', [sic] but rather because it represents a resolution of the problems, incoherences, anomalies, inconsistencies and limitations of the *previous* scheme or theory, and so constitutes an advance on it, in relative but not absolute terms.⁸⁵

In other words, the need to resolve inconsistencies drives progress in the development of law.

The shared position of Hegel and Dworkin is that we must employ a normative evaluation when attempting to resolve inconsistencies. Their task is to delineate precisely how this normative dimension factors into the development of law. For

84. *Contra* POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 13, at 22-23, 235-37 (denying "morality" in any community and arguing that moral progress is illusory).

85. Robert Stern, *MacIntyre and Historicism*, in AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE 151 (John Horton & Susan Mendus, eds., 1994); *see also* Robert Stern, *Hegel and the New Historicism*, 21/22 BULL. HEGEL SOC. GREAT BRITAIN 55, 60-64 (1990); LARRY LAUDAN, PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH 5, 18 (1977) (describing a proper understanding of progress as "problem solving effectiveness" and "the transformation of anomalous and unsolved . . . problems into solved ones.") (emphasis omitted).

instance, Dworkin argues that “[i]n any case, the existence of a moral dimension of assessment in our experience is not in question, though its status is.”⁸⁶ He adds:

Morality is a distinct, independent dimension of our experience, and it exercises its own sovereignty. We cannot argue ourselves free of it except by its own leave, except, as it were, by making our peace with it We cannot climb outside of morality to judge it from some external archimedean [sic] tribunal, any more than we can climb out of reason itself to test it from above.⁸⁷

Accordingly, it would be wrong to think we could offer substantive evaluations independently of a moral perspective when evaluating positive law.

In addition, the similarities between Hegel and Dworkin run deeper. This becomes clear when we address an incoherence in Dworkin’s argument. Dworkin denies that law’s normative content is conceptually separate from morality. He also denies that the progressive development of non-normative content drives law’s transformation into justice. While the equality of law and justice is only possible through law’s immanent development, Dworkin claims that the *only* relevant moral principles immanent to law arise *exclusively* from within the positive law and do not exist independently of law.⁸⁸ Therefore, he is not claiming that only one kind of morality exists, nor that all normative, legal developments will follow one single path. Instead, his argument is that the only normative influences relevant to a progressive development of law are moral principles embedded within or immanent to the law itself. As a result, he claims that certain varieties of normativity—moral principles immanent to law—are pertinent to legal development,

86. Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87, 90 (1996) [hereinafter Dworkin, *Objectivity and Truth*].

87. *Id.* at 128.

88. *See supra* note 76 and accompanying text.

while other kinds of normativity—moral principles that exist independently of law—may *not* be pertinent to legal development.⁸⁹

It is unclear why Dworkin argues certain norms must lie permanently outside considerations of justice perhaps other than to avoid charges of being a natural lawyer. Hegel would surely agree with Dworkin that law cannot be considered separately from its normative content.⁹⁰ However, this normative content is at least *conceptually* distinct: normative considerations relevant to law can be entertained independently of law. On the contrary, every law is implicitly an attempt to capture the demands of justice.⁹¹ In the interest of theoretical consistency, Dworkin should endorse the view that law and its normative content are conceptually separate and, thus, normative content may be considered “extra-legal” in this light.

Unfortunately, both Dworkin and Hegel face a similar difficulty. Neither needs to deny the existence of an extra-legal normative content that develops immanently within law.⁹² Yet, both must demonstrate exactly why normative content exists immanently within our positive laws rather than elsewhere. Without a convincing explanation, each may face common objections to his theories—especially from legal positivists—along the lines that the norms he employs for legal development are derived independently and not immanently. Thus, their legal theories open themselves anew to charges that they are best characterized as belonging to the school of natural law jurisprudence.

In addition, a case can be made that Dworkin’s frequent endorsement of the principle of equal entitlement to concern and respect fulfils a similar overall function to Hegel’s use of normative content, although the two are different in several ways.⁹³ For Dworkin, this principle enables individuals to recognize and pursue

89. *Id.*

90. See *supra* note 59 and accompanying text.

91. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 211, 212.

92. A further difficulty each faces is the highly abstract presentation of his views with few concrete illustrations.

93. See DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 69, 84-85; DWORKIN, FREEDOM’S LAW, *supra* note 2, at 26; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at xii, 198, 201, 273.

justice.⁹⁴ Likewise, for Hegel, normative content contains the possibility of achieving just institutions and laws.⁹⁵

Several similar features of Dworkin's and Hegel's general legal theories should now be clear. Each recognizes a distinction between law and justice bridged by the development of normative content. In addition, both claim—albeit in different ways—that the normative content embedded within law serves as the sole source of its development. The major difference is that Hegel's theory recognizes that law's normative content is conceptually separate from law, an argument that Dworkin's theory denies.⁹⁶ Yet, Dworkin's view requires law and its normative content to be substantively inseparable, which this article has claimed is implausible. Therefore, Dworkin's theory would benefit from accepting that law's normative content may be considered non-legally, a role that his principle of equal concern and respect appears to endorse. In this way, Hegel's theory enables us to find solutions to problems in consistency with Dworkin's theory.

III. THE IMMANENT DEVELOPMENT OF LAW INTO JUSTICE

Thus far, we have uncovered significant coherence between Hegel's and Dworkin's legal theories on the relationship between law and its normative content. This relationship follows an immanent, progressive development towards transforming law into justice. In this section, their claims regarding how such a development should come about is discussed, and the unique position they share is thusly demonstrated. The following section examines the role of democratic institutions in their theories of law, where there is further agreement between Hegel and Dworkin.

Neither Hegel nor Dworkin presents his legal theory as a new way of practicing law. Instead, each presents his theory as a new way of

94. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 182. Dworkin primarily endorses the principle of equal concern and respect because it is our highest standard of justice. *Id.* at xii.

95. See HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, § 3R.

96. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, §§ 34-141, 209-28 (theorizing the spheres of abstract right and morality prior to the main part of his theory of law).

understanding what we generally do already. For example, Hegel presents an account of “the present and the actual, not the setting up of a world beyond which exists God knows where.”⁹⁷ Likewise, Dworkin is careful to point out that his legal theory is not infected by anything otherworldly.⁹⁸ He says: “If I thought that my thesis was a banner for revolution, I would hardly argue that judges characteristically do what it recommends.”⁹⁹ In this light, both Hegel and Dworkin see the role of the legal theorist as advising how we can internally improve our legal practices. In their view, we should never look outside of our practices for guidance on how best to improve these practices.

A. *Law as a Seamless Web*

The task of implementing an “immanent, progressive development of law”—a phrase oft used in this article—may still seem to operate at a purely abstract level, divorced from our actual practices. This task is to be approached with an eye toward making our legal system more coherent.¹⁰⁰ For Dworkin, independently approved pieces of legislation that exist as valid laws are not islands of law separated by a sea of nothingness. Instead, perhaps unintentionally, these valid laws, even though they might appear to be unrelated, form a unified body of law. Thus, law should be understood as *a seamless web*.¹⁰¹ Dworkin says: “legal reasoning is an exercise in *constructive interpretation*, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.”¹⁰²

97. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, at 20 (emphasis omitted).

98. See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM x (1993) (claiming that Dworkin's hope is to convince opponents “that they have misunderstood the basis of their own convictions”); DWORKIN, LAW'S EMPIRE, *supra* note 1, at 168; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 176-77, 216; Dworkin, *Objectivity and Truth*, *supra* note 86, at 118.

99. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 312.

100. See DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 2 (noting that the rule of law means “a coherent and uncompromised vision of fairness and justice”).

101. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 116.

102. DWORKIN, LAW'S EMPIRE, *supra* note 1, at vii (emphasis added).

This view—characteristic of legal interpretivism—claims that apparent “spaces” or “gaps” that lie either knowingly or unknowingly between explicit and articulated points of positive law have standing as unarticulated points of law in need of explicit recognition. In other words, interpretivists argue that any so-called “gaps” in the legal web should be thought of as *unarticulated* spaces of law existing between discrete points of *articulated* law. Thus, *all* spaces are “law,” properly understood.¹⁰³ To reiterate a previous point, it is important to remember that these spaces are said to be recoverable from *within* the law and not from without.¹⁰⁴ As a result, the interpretivist’s task is to *recover*, not *discover*, what serves as law.¹⁰⁵

While only Dworkin describes his legal theory as “interpretivist” or “constructive interpretivism,”¹⁰⁶ it is clear that this new feature—that of holding law as a seamless web—is something Hegel’s legal theory shares. At first glance, legal systems may appear to be little more than “a collection without principle, whose inconsistencies and confusion require the most acute perception to rescue it as far as possible from its contradictions”¹⁰⁷ For Hegel, law should seek to resolve these contradictions from within itself.¹⁰⁸ To best achieve this goal, law’s normative content develops immanently. Hegel says, “the progress from that which forms the beginning is to be regarded as only a further determination of it, hence that which forms the starting point of the development remains at the base of all that

103. See F. A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY: VOL. 2, THE MIRAGE OF SOCIAL JUSTICE 159 n.4 (1976) (“If by ‘system of rules’ is understood a collection of articulated rules, this would certainly not constitute the whole law Thus, while I wholly agree with the substance of Professor Dworkin’s argument, I should, in my terminology, affirm that the law *is* a system (and not a mere collection) of (articulated and unarticulated) rules.”).

104. See, e.g., HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 268 (“Law is part of the existing state of things, with Spirit *implicit* in it.”) (emphasis added).

105. This would mean that the justification of legal rights (and their reasonableness) would be exhausted by relevant legal considerations. *But see* Leif Wenar, *Epistemic Rights and Legal Rights*, 63 ANALYSIS 142, 144 (2003) (offering an important contrary view of legal rights).

106. See, e.g., DWORKIN, LAW’S EMPIRE, *supra* note 1, at 7.

107. HEGEL, POLITICAL WRITINGS, *supra* note 61, at 11.

108. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 216; *see also* HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 263 (criticizing Sparta for choosing to perfect their laws with non-legal measures, rather than attempt an immanent development out of their written laws).

follows and does not vanish from it.”¹⁰⁹ Our progressive comprehensions of law are produced from within law’s normative content.¹¹⁰ Likewise, all developments of law entail an increasingly robust knowledge of law. Thus, the development of a system of laws may appear as a change in the number of valid laws.

In addition, Hegel argues that “[t]he scope of the law [*Gesetze*] ought on the one hand to be that of a complete and self-contained whole, but on the other hand, there is a constant need for new legal determinations [*gesetzlicher Bestimmungen*].”¹¹¹ Hegel says: [This is] an advance . . . of the analytic intellect, which discovers new distinctions, which again make new decisions necessary. To provisions of this sort one may give the name of *new* decisions or *new* laws [*Gesetze*]; but in proportion to the gradual advance in specialization the interest and value of these provisions declines. They fall within the already subsisting ‘substantial’, [sic] general laws, like improvements on a floor or a door, within the house—which though something *new*, are not a new *house*.¹¹²

Therefore, what is *new* in any determination of law’s normative content is only the implicit aspect of this content that had not been recognized previously. Crucially, for Hegel, law is a seamless web and we must endeavour to articulate these implicit, yet, thus far, unrecognized, legal determinations from within law’s normative content. The more these determinations are made explicit, the richer our understanding of law becomes and, as a result, the closer law coheres with justice.¹¹³

Both Hegel and Dworkin participate in a similar project, distinct from both natural law and legal positivism. They each hold that all

109. G. W. F. HEGEL, SCIENCE OF LOGIC 71 (1969) (emphasis omitted); see also G. W. F. HEGEL, THE ENCYCLOPAEDIA LOGIC § 11R (1991) (noting logic’s “capital importance” in bringing about new rational determinations “from its own resources”).

110. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 31.

111. *Id.* § 216 (emphasis omitted).

112. HEGEL, PHILOSOPHY OF MIND, *supra* note 38, § 529.

113. See *id.* (noting that man is always creating new laws by drawing from the unarticulated set of laws).

individual positive laws should be seen as a coherent whole.¹¹⁴ When apparent conflicts arise, we must attempt to discern guiding normative principles embedded in the legal system that help us make best sense of how these laws fit together.¹¹⁵ Both Hegel and Dworkin deny that they are appealing to anything otherworldly or “spooky.”¹¹⁶ Indeed, their shared purpose is to show us how we ought to *think* about the laws we have, not what these laws ought to be. Moreover, as we fill these apparent gaps in the law, the law progresses developmentally towards true justice. In time, it may be the case that we filled gaps in the law incorrectly. We are entitled to replace our mistaken judgement in these instances.¹¹⁷

For example, the arrival of the Internet as a new medium of global trade and interaction brought with it a corresponding recognition of additional gaps in the law. Previous legislation and precedential authority had not been created with an eye toward resolving potential problems specific to the use of the Internet. For Hegel and Dworkin, when we incorporate resolutions to these problems we make our law more coherent and complete. In addition, we employ resources immanent to law, such as moral principles. Thus, we might seek to resolve online trade disputes by turning to and validating conventional trade dispute law and precedent. When there is more than one law or precedent to choose from, we appeal to the law or precedent that brings out what we believe is a superior use of moral principles immanent to our law, thus bringing better coherence to our legal system as a whole. In this way, we engage in developmental progress of our laws as we fill gaps in the legal web. Of course, mistaken choices may be made along the way. In these circumstances, we may replace the choices we made: if we do not,

114. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 2; HEGEL, PHILOSOPHY OF MIND, *supra* note 38, § 529 (noting that many laws arising from different contexts nonetheless form a unified set of laws because they embody similar principles).

115. Of course, this view is deeply problematic if one sees no reason to view individual positive laws as part of a strongly coherent legal system.

116. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, at 20; DWORKIN, LAW'S EMPIRE, *supra* note 1, at 168.

117. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 211R (suggesting that under English common law judges are too dependent on the authority of precedent).

then we build into law a variety of mistakes that contribute to its incoherence.

In filling these “gaps” in the law’s seamless web, we engage in codification. As an example, Hegel assumes that a community’s initial attempt to construct the best possible legal system will never be its final attempt. Legal codes exist primarily as an incomplete collection of various laws.¹¹⁸ This task is not to be achieved overnight, but “is the work of centuries.”¹¹⁹ In this effort, Hegel endorses the codification of all legal determinations.¹²⁰ Therefore, to clarify what law is, we must formulate law explicitly.

This formulation may not be entirely correct—perhaps it is completely misguided—but attempts to explicitly define justice serve as a precondition to improving our comprehension of justice. Thus, Hegel claims that justice [*Recht*] comes to have “existence [*Dasein*] in the form of law [*Gesetzes*]” rather than in “particular volitions and opinions.”¹²¹ More importantly, at a general level, positive law plays an instrumental role by enabling members of the community to gain a “cognition of what is *right* [*Recht*], or more precisely, of what is *lawful* [*Rechtens*].”¹²² Unsurprisingly, Hegel disapproves of English common law—claiming it is riddled with “enormous confusion”—on account of being a “so-called unwritten law.”¹²³ Hegel’s argument is that if we do not make any genuine attempt at making more explicit our comprehension of what justice is in the form of positive laws, we lack a more secure basis from which we can refine our comprehension of what justice might be. In this sense, we shed some degree of arbitrariness of what justice demands when we make an

118. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 211R.

119. See, e.g., *id.* § 274A (describing that a constitution is not simply made).

120. *Id.* § 211R; see also KNOWLES, *supra* note 7, at 278 (noting that for Hegel, “[c]odification is the philosopher’s stone of jurisprudence.”); KNOWLES, *supra* note 7, at 280 (“Readers may judge that Hegel’s stylistic practice belies his principles, but incredible as it may seem, one principle which is constant throughout his system is his admirable and absolutely sincere insistence that the truth be *effable*, clear and simple to understand in its processes as well as its promulgations.”).

121. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 219 (emphasis removed).

122. *Id.* § 212R; see, e.g., *id.* at 76.

123. *Id.* § 211R.

attempt to express it, or in Hegel's words make justice more "determinate."¹²⁴

Even if problematic, Hegel's favorable predisposition toward codification is largely unsurprising, as codification is a primary objective of most continental legal systems.¹²⁵ In this way, Hegel's legal theory can be thought to be part of this tradition. What is surprising is that Dworkin—from the common law tradition—which normally resists codification—shares a position similar to Hegel's.¹²⁶ Indeed, like Hegel, Dworkin disapproves of Britain's unwritten constitution, famously arguing for Britain to adopt an American-style Bill of Rights.¹²⁷ He says, "[T]hough a written constitution is certainly not a sufficient condition for liberty to thrive again in Britain, it may well be a necessary one."¹²⁸ This makes sense if we believe that the law is a seamless web and that one of the legal theorists' primary tasks is to make explicit the implicit, unarticulated spaces of law in between articulated positive laws.

B. Individual Rights and Codification

Where Hegel and Dworkin differ is that Dworkin claims we should only make explicit those legal rights that are individual rights.¹²⁹

124. See, e.g., HEGEL, POLITICAL WRITINGS, *supra* note 61, at 52.

125. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, at 446 editor's note 4 (noting that Hegel's endorsement of codification is almost entirely opposed to the historical school of jurisprudence to which he is often associated as a member: "It was the principal thesis of Karl Friedrich von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* that Germans should not follow the French example and codify their law."); see, e.g., FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1975).

126. It is the author's position that Dworkin follows the civil law tradition more closely on this point as a necessary consequence of the "law as a seamless web" theoretical position. Martin Golding suggests that Dworkin's claim that there cannot be gaps in the law "does not represent the method of the common law." Instead, the common law should be thought of as a "crazy quilt," rather than a seamless web. Martin P. Golding, *The Legal Analog of the Principle of Bivalence*, 16 *RATIO JURIS* 450, 453, 467 (2003).

127. See generally RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990) [hereinafter DWORKIN, A BILL OF RIGHTS FOR BRITAIN]. Cf., e.g., DWORKIN, LAW'S EMPIRE, *supra* note 1, at 378 ("I have not argued that every nation ought to have a written constitution with abstract provisions about individual rights, or that every such constitution ought to be interpreted by a court whose members are chosen in just the way Supreme Court justices are appointed.") (emphasis added).

128. DWORKIN, A BILL OF RIGHTS FOR BRITAIN, *supra* note 127, at 14.

129. See, e.g., DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 364 ("[A] claim of political right is a claim to a trump over the general welfare for the account of a particular individual."); *id.* at 90

Thus, we ought to make explicit only some of the unarticulated spaces in the law's web—the rest should remain in a contestable limbo. There are set parameters for discerning rights as a result. This position is not entirely objectionable. For Dworkin, “[P]eople have as legal rights whatever rights are sponsored by the principles that provide the best justification of legal practice as a whole.”¹³⁰ Indeed, he rightly argues for consistency by arguing that rights will be grounded in past decisions of political institutions, until they are overruled.¹³¹ Therefore, Dworkin is clear that his theory endorses precedential authority.

However, he also argues that *individual* rights—and none others—serve as political trump cards.¹³² Individuals have rights against the majority as their rights “trump” others, even in the face of collective interests.¹³³ Dworkin says: “Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”¹³⁴ Here Dworkin is not claiming these rights are obvious. Instead, he claims: “Let it at once be conceded that rights may be controversial.”¹³⁵ The

(“Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.”). For Dworkin, judges engage only in “arguments of principle.” Problematically, Dworkin also includes corporations as “individuals” that “may have rights.” *Id.* at 91 n.1. Insofar as corporations pursue the collective goals of their constituent members, then it may seem that corporations benefit from both arguments of principle (as they are treated as individuals) and arguments of policy (again, insofar as the goal is a collective goal). Thus, Dworkin does not draw this distinction as sharply as he intends to.

130. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 152.

131. *See, e.g., id.* at 134, 152; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 88.

132. *See, e.g.,* DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 223, 381; DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 2, at 32 (“[J]ustice is in the end a matter of individual right, and not independently a matter of the public good.”). Thus, Chin Liew Ten wrongly believes that Dworkin's theory justifies whatever principles exist in a legal system. *See* Ten, *supra* note 13, at 531-32. Dworkin believes Herbert Hart makes a similar mistake. *See* Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 256, 257 (Marshall Cohen ed., 1984) [hereinafter Dworkin, *A Reply*]. Instead, Dworkin argues that law must regard individual rights as trumps entailing limits on the acceptability of any legal system's set of principles, such that “we should reject . . . the idea that a discriminatory principle might figure in the best justification of Nazi law.” *Id.* at 299 n.4.

133. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 146, 177, 269, 364.

134. *Id.* at xi.

135. *Id.* at 281.

point Dworkin raises is that when we try to discern legal rights embedded in our positive law by grasping the law's normative content, we engage in a project of recovering individual rights—rights that cannot be infringed by the state.¹³⁶

By point of comparison, Hegel's theory also takes individual rights seriously. In his view, individuals have a right to what he calls "subjective freedom"—a space where individuals can pursue freely their particular interests without infringing upon the rights of others in their community.¹³⁷ One more obvious example of subjective freedom for Hegel is the right of individuals to fall in love and create their own families.¹³⁸ All things considered, Hegel believes that those who fail to create their own families enjoy less freedom than is possible.¹³⁹ Nevertheless, the law ought never command any person to marry and procreate and, thus, individuals enjoy a space where law cannot intrude. A second example of subjective freedom is the right of individuals to choose their own occupations.¹⁴⁰ While in each case Hegel argues the state should never interfere, he does *not* claim that in limiting the state we refuse to make explicit any genuine rights of others—including the collective interest. It is not a matter of setting limits for political deliberation, but rather the case that there are no such rights to be found. As a result, Hegel does not recognize the legal entitlement of individuals to engage in acts of civil disobedience: in fact, "duty requires all citizens to rally to [the state's] defence."¹⁴¹ Yet, Dworkin's view that individual rights are political trump cards restricting state regulation more broadly endorses civil disobedience—whether or not the state is under threat.¹⁴²

136. *See id.* at 90.

137. *See, e.g.,* HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 153, 154.

138. *See id.* §§ 158-81. Of course, Hegel's concept of the family is a very traditional one.

139. *See, e.g., id.* §§ 162R, 163R, 167R, 255R.

140. It is noteworthy that this does not seem true for the head of Hegel's state: the hereditary monarch. For him, his occupation is neither chosen nor refused. *See generally* Thom Brooks, No Rubber Stamp: Hegel's Constitutional Monarch, 28 HISTORY OF POLITICAL THOUGHT 91 (2007).

141. *See* HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 326, 324R; HEGEL, LECTURES, *supra* note 37, § 160R.

142. *See generally* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 206-22.

Dworkin's priority of individual rights sits rather well with the political liberalism he espouses. However, it is not clear why only some parts of the legal web are to be recovered, while other parts are left unknown—even if he desires his theory to strongly endorse liberalism. Indeed, it seems inconsistent to hold that law is a seamless web whose various determinations are recoverable but *not all* legal rights should be recovered.¹⁴³ If there is some substantive good in making distinctions of particular *rights* in constitutional law, then there may be good reason to make further distinctions of rights by a greater codification of the law. In fact, Dworkin can just as easily claim that constructive interpretivists should make explicit all legal gaps while giving priority to some rights, namely individual rights, over others.

Therefore, Dworkin could bring greater coherence to his legal theory by following Hegel's lead, as Hegel does not limit which rights may be made explicit when bringing greater articulation to the law's seamless web. Dworkin could follow Hegel while maintaining a priority of individual rights over other rights. Dworkin could then offer a legal theory that is perhaps more friendly to political liberals than Hegel's version. Thus, Hegel's and Dworkin's very similar theories compliment each other and point towards solutions for internal difficulties we may find in them. Furthermore, what is perhaps the biggest difference between them—the different legal traditions in which their theories reside, continental and common law—is overcome by their common endorsement of codification.¹⁴⁴

143. A further problem for Dworkin may be his claim that “[a]rguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.” *Id.* at 90. Judges engage in arguments over principles and, therefore, individual rights; legislatures concern themselves with policy considerations and the fulfilment of collective goals. Yet Dworkin also holds that, in addition to human beings, “corporations may have rights” as Dworkin “count[s] legal persons as individuals,” too. *Id.* at 91 n.1. Of course, it is conceivable that in certain instances the rights of a corporation to pursue good may conflict with the rights of an individual to do the same. Such a case muddles precisely how we should understand the different roles of the courts (with regard to principles and rights) and the legislature (with regard to policies and collective goals), as it would appear Dworkin would have to argue that, as a legal person, a corporation is both a holder of rights and a collective good at the same time. The author thanks to Ken Himma for pushing him on this point.

144. While the endorsement of codification may bring Dworkin's theory closer to the continental system where codification is a primary characteristic, it is important to note that Hegel's theory endorses

C. *An End of History for Law as a Seamless Web?*

If the law is a seamless web, is it possible for us to create a perfectly coherent legal system where all laws are made explicit for all time? Hegel disagrees, saying that “a perfect legislation, together with true justice in accordance with the determinacy of the laws, is inherently impossible. . . .”¹⁴⁵ The problem, in Hegel’s view, is that law must speak to a variety of cases. While it is possible to reflect on past cases in calibrating what serves as present laws, it is perhaps impossible to predict what new overlooked issues will appear in future cases. Legal theory is perhaps somewhat conservative in this sense. Thus, Hegel rightly says, “It is therefore mistaken to demand that a legal code [*Gesetzbuch*] should be comprehensive in the sense of absolutely complete and incapable of any further determinations. . . .”¹⁴⁶ In fact, he thinks that law must always be flexible enough to accommodate future changes in “a perennial approximation to perfection [*Vollkommenheit das Perennieren der Annäherung*].”¹⁴⁷ This fact of law—that it will always remain incomplete in some sense—is, of course, never a reason to abandon having laws.¹⁴⁸

This position is shared by Dworkin, who says, “Absolute clarity is the privilege of fools and fanatics.”¹⁴⁹ While it is often claimed that he endorses the position that there are *always* “right” answers to so-called “hard cases,”¹⁵⁰ Dworkin instead argues that one party *may*

the right to trial by jury—a primary characteristic of the common law system. See, e.g., HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, § 228R. In this way, there is even more common ground between them than we might expect.

145. HEGEL, *POLITICAL WRITINGS*, *supra* note 61, at 144.

146. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, § 216R.

147. *Id.* § 216R (emphasis omitted).

148. *Id.* § 216R, A.

149. Dworkin, *Objectivity and Truth*, *supra* note 86, at 135.

150. See, e.g., POSNER, *PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 14, at 22; John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW*, *supra* note 6, at 36; Kenneth Einar Himma, *Trouble in Law’s Empire: Rethinking Dworkin’s Third Theory of Law*, 23 OXFORD J. LEGAL. STUD. 345 (2003); Lewis, *supra* note 14, at 377-78; D. N. MacCormick, *supra* note 14, at 589-90; Soper, *supra* note 14, at 11; A. D. Woosley, *No Right Answer*, 29 PHIL. Q. 25 (1979). This view is also shared by Justice Antonin Scalia:

The idyllic notion of “the court” gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly operative facts become apparent—that notion simply cannot be applied to

have a right to *win*.¹⁵¹ This is because Dworkin's methodology leaves its conclusions open. He says: "Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past."¹⁵² In addition, Max Atkinson argues:

Some of Dworkin's critics are discomfited by the inconclusive nature of his theory's pursuit of justice in this way, because it can *never* guarantee that a presently accepted version of the law is correct. But this is part of the price of his idealisation model For the idealisation model specifies only the procedure, not the solution, even if this procedure postulates that a correct solution is attainable in principle.¹⁵³

Both Hegel's and Dworkin's legal theories are open to revision on questions of best legal practice. Neither prescribes in advance the solution to a contested matter of law, they only prescribe the procedure by which we try to solve such problems. In solving problems, we fill gaps in the legal web and, correspondingly, improve our comprehension of justice in our positive laws. As Dworkin says, "errors in the theory will be guides to a more

a court that will revisit the area in question with great infrequency [as is the case with the U.S. Supreme Court].

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (emphasis omitted). In response to this common objection to his theory, Dworkin responds:

I do not think that it is either useful or possible to develop any general argument that there can be right answers in hard cases. For there can be no better argument for that thesis than the ordinary kind of legal argument someone might make to show that *X* in MacCormick's case has, all things considered, a legal right to recover his damages. Or to show that he does not. There can be no different or better kind of argument designed to prove that there can be a right answer in such a case than an argument that tries to show what the right answer is. And no way to show that there cannot be a right answer except to show why all such arguments would be inadequate as legal arguments.

Dworkin, *A Reply*, *supra* note 131.

151. See, e.g., DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at xii, 279-80; Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 8; Leon Galis, *The Real and Unrefuted Rights Thesis*, 92 PHIL. REV. 197, 200 (1983).

152. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 413.

153. Max Atkinson, *Taking Dworkin Seriously: A Look at Lewis' Counter-Theory*, 61 AUSTRALASIAN J. PHIL. 27, 30, 34 (1983) (emphasis added).

successful theory.”¹⁵⁴ Thus, Hegel’s and Dworkin’s legal theories claim an ability to chart progress in their development without being predictive of particular decisions. What we decide is left open so long as we make our choice within parameters properly affixed by rational structures that help ensure that our choices are properly decided.

IV. THE ROLE OF DEMOCRATIC INSTITUTIONS

Of course, law does not develop all by itself. Human institutions are crucial to the immanent development of law as it articulates implicit legal rights in the legal web for both Hegel and Dworkin. Here Hegel offers little by way of argument. He endorses the view that the process of progressive development in law entails greater codification in keeping with our best comprehension of justice.¹⁵⁵ Thus, codification is a good thing, as it is a concrete attempt to ascertain justice.

A. *The Community’s Shared Notion of Justice*

Lawmakers are only incidental to this process, although they are the political body through which legal development transpires.¹⁵⁶ Indeed, if lawmakers inject personal convictions divorced from the community’s shared sense of justice, they can be said to “taint” the law.¹⁵⁷ Hegel seems to take for granted that in drafting new laws or revising old laws, legislatures both continually progress our comprehension of justice as positive laws and express a conception of justice held in common by the community.¹⁵⁸ Therefore, a community’s shared notion of justice—whatever it turns out to be—is crucial to how Hegel sees law progressively developing into something more commensurable with justice. This is an important

154. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 110.

155. See *supra* Part III.

156. See generally HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 298-320.

157. See *id.* § 309.

158. See HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 251-52, 259; see also Jean-Philippe Deranty, *Hegel’s Parliamentarianism: A New Perspective on Hegel’s Theory of Political Institutions*, 32 THE OWL OF MINERVA 107, 111 (2001) (discussing the development of Hegel’s views on the function of the legislature).

aspect of Hegel's theory which we will soon see reappear in a slightly different form with Dworkin.

First, consider Hegel's use of "abstract right [*das abstrakte Recht*]." With abstract right, what is taken for "right [*Recht*]" is what can be determined by agreement.¹⁵⁹ His use of legal right builds from this precondition. For example, in his view, it is very possible that in certain circumstances an individual may have correctly grasped some improved idea of the demands of justice, in some abstract sense.¹⁶⁰ However, this will not constitute what will pass as "law" until its truth can be demonstrated persuasively to others first.¹⁶¹

As a result, the transition away from a purely individualistic conception of right towards a more communitarian and "true" conception of right entails our positive laws' more closely corresponding to justice.¹⁶² Laws exist only as our best attempts to posit justice.¹⁶³ A community seeks to make explicit its best conception of justice with each individual act of recognizing a particular written law.¹⁶⁴ The positive law is then a distinct application of a more general conception of justice.¹⁶⁵

159. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 132R.

160. See *id.*

161. See *id.* §§ 136R, 258R ("Hatred of law, of legally determined right, is the shibboleth whereby fanaticism, imbecility, and hypocritical good intentions manifestly and infallibly reveal themselves for what they are . . .").

162. See *id.* §§ 144, 260. The institutions of law's administration appear in "civil society," but are more completely manifested in "the state." Additionally, Hegel argues that his anti-atomistic conception of individuality is defensible on selfish individualistic grounds, as one "cannot accomplish the full extent of his ends without reference to others," see *id.* § 182A, and, thus, "[t]he selfish end in its actualization, conditioned in this way by universality, establishes a system of all-round interdependence," *id.* § 183, therefore, "[i]n furthering my end, I further the universal, and this in turn furthers my end." *Id.* § 184A. See also *id.* §§ 192A, 265A.

163. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 210, 212.

164. See *id.* § 206R.

The recognition and right according to which all that is rationally necessary in civil society and in the state should at the same time come into effect *through the mediation of the arbitrary will* is the more precise definition [*Bestimmung*] of what is primarily meant by the universal idea [*Vorstellung*] of freedom.

Id. (citation omitted). See also *id.* § 211R; HEGEL, POLITICAL WRITINGS, *supra* note 61, at 144-45.

165. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 3, 214, 299R ("[A] law [*Gesetz*], in order to be law [*Gesetz*], must be more than just a command [*Gebot*] in general . . . i.e. it

Hegel's claims that the community plays a crucial part in the determination of justice as law renders his views on democratic legitimacy problematic. For example, it is well known that Hegel holds a dismissive view of public opinion.¹⁶⁶ It is not suggested here that, Hegel believes the state should be *unresponsive* to the citizenry's approval or disapproval of public policies. In fact, Hegel notes that a state's long term success will depend upon the popular support of its institutions. He says:

It has often been said that the end of the state is the happiness of its citizens. This is certainly true, for if their welfare is deficient, if their subjective ends are not satisfied, and if they do not find that the state as such is the means to this satisfaction, the state itself stands on an insecure footing.¹⁶⁷

Yet, while Hegel acknowledges that the state must earn the popular respect of its citizens, he equally believes that public opinion should influence a state's policies minimally. That is, Hegel believes "the people must take part in the making of laws and in the most important affairs of the state,"¹⁶⁸ but he also believes that the best way for "the people" to do this is through a body representing their interests rather than public referenda.¹⁶⁹ Thus, Hegel argues:

The idea [*Vorstellung*] that *all* individuals ought to participate in deliberations and decisions on the universal concerns of the state—on the grounds that they are all members of the state and that the concerns of the state are the concerns of *everyone*, so that everyone has a *right* to share in them with his own

must be *determinate* in itself . . . the more determinate it is, the more nearly capable its content will be of being implemented as its stands.") (translation modified).

166. See *id.* § 318A ("[N]o one can achieve anything great, unless he is to despise public opinion as he here and there encounters it."); see also *id.* §§ 308R, 309A, 316A; HEGEL, POLITICAL WRITINGS, *supra* note 61, at 270.

167. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 265A; see also *id.* § 308R; HEGEL, POLITICAL WRITINGS, *supra* note 61, at 16-17.

168. HEGEL, POLITICAL WRITINGS, *supra* note 61, at 94

169. *Id.*

knowledge and volition—seeks to implant in the organism of the state a *democratic element devoid of rational form* The idea [*Vorstellung*] that *everyone* should participate in the concerns of the state entails the further assumption that *everyone is an expert on such matters*; this is also absurd, notwithstanding the frequency with which we hear it asserted.¹⁷⁰

In speaking of “a democratic element devoid of rational form,” Hegel rejects the legitimacy of a more pure democracy. He does *not* oppose democratic legitimacy of the state and its activities pursued in the name of the community. Indeed, Hegel believes that paternalist governments stifle freedom.¹⁷¹ However, he opposes the influence of arbitrary opinion on public decision-making, including the creation of law.¹⁷² Hegel’s theory is *not* anti-democratic *at all*—and certainly least of all totalitarian *pace* Popper.¹⁷³ As an example, Hegel criticizes Chinese laws for treating citizens like children “who obey their parents without will or insight of their own.”¹⁷⁴

Despite Hegel’s unconventional endorsement of democratic governance, we may be inclined to further justify his use of democracy because it is unrelated to our contemporary understanding of democracy.¹⁷⁵ One good example is voting rights. Modern democracies characteristically extend suffrage to all adult individuals.

170. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 308R.

171. See HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 174.

172. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31 §§ 308R, 309A, 316A, 318A.

173. See POPPER, *supra* note 8, at 22, 49, 59, 62, 64, 66, 287 n.25, 310 n.43, 395. Indeed, in THE PHILOSOPHY OF HISTORY, Hegel argues that our obedience to our positive laws is “not that blind and unconditional compliance which does not know what it is doing, and whose course of action is a mere groping about without clear consciousness or intelligence” as we only owe obedience ultimately “to laws which I recognize as just.” HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 380. Therefore, we need not agree with Popper that “[t]he Hegelian farce has done enough harm. We must stop it. We must speak—even at the price of soiling ourselves by touching this scandalous thing which, unfortunately without success, was so clearly exposed a hundred years ago.” POPPER, *supra* note 8, at 79.

174. HEGEL, THE PHILOSOPHY OF HISTORY, *supra* note 30, at 104; *see also id.* at 112.

175. On democracy, see generally ROBERT A. DAHL, ON DEMOCRACY (1998); IAN SHAPIRO, DEMOCRATIC JUSTICE (1999). For a critique, see generally Thom Brooks, *A Defence of Sceptical Authoritarianism*, 22 POLITICS 152 (2002); Thom Brooks, *Can We Justify Political Inequality?* 89 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 426 (2003) (Germany).

For Hegel, people are little more than an irrational mass “without articulation” in a rational form.¹⁷⁶ Thus, he argues that “[v]oting rights must rest in commonalities, in corporations. Citizens must make their choices in ordered, recognized associations.”¹⁷⁷ If adopted, such arrangements, whatever their merits, would greatly curtail the voting privileges of many people in liberal democracies—and not least those of women.¹⁷⁸

Before turning to Dworkin’s views on the relationship between the community and law’s pursuit of justice, we should take a brief look at one last area where the public is afforded a special place in Hegel’s legal system: the judiciary. As we have seen already, a legislative body performs most of the work of incorporating “justice” into the positive law.¹⁷⁹ Furthermore, for Hegel and many of his contemporaries, the judiciary was not a separate branch of government; but, instead, a part of the executive branch.¹⁸⁰ The argument was that the job of all executive departments, including the judiciary, was merely to execute universal laws in particular cases.

Hegel recognizes correctly that from time to time “collisions [*Kollisionen*]” will arise in the imperfect application of laws.¹⁸¹ This fact, however, is a great virtue of the judicial system rather than a defect, as Hegel says, “[T]his is entirely necessary, for the implementation of law would otherwise be a completely mechanical process.”¹⁸² The development of law should thus be viewed as a living development of right and not merely an academic exercise.

176. See HEGEL, LECTURES, *supra* note 37, § 148R.

177. *Id.* § 153R. See generally HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 301-18.

178. Women would be denied the right to vote. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 166A (“When women are in charge of government, the state is in danger, for their actions are based not on the demands of universality but on contingent inclination and opinion.”).

179. See *supra* notes 156-58 and accompanying text.

180. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 214, 273, 287, 290A; HEGEL, POLITICAL WRITINGS, *supra* note 60, at 232 (describing only two separate branches of government, the legislative branch and the judiciary); JOHANN GOTTLIEB FICHTE, FOUNDATIONS OF NATURAL RIGHT §§ 16:161-62, at 142-43 (2000).

181. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 211A; see also HEGEL, POLITICAL WRITINGS, *supra* note 61, at 233 (“[W]hile the civil laws go a long way in their specifications [*das Bestimmen*], they still cannot touch on every particular.”).

182. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 211A.

Hegel believes that there must be some leeway given in each case in order to accommodate the case's peculiarities.¹⁸³ In his view, the law would be blind to the concrete cases from which it developmentally improves itself if it were to do otherwise.¹⁸⁴ However, judges should never give voice to their own personal view as to right's application in a case, as this would entail that the judges' decisions would be "arbitrary [*Willkür*]."¹⁸⁵ The court's responsibility is to comprehend justice "in the particular case, without the subjective feeling [*Empfindung*] of *particular* interest."¹⁸⁶

Interestingly, Hegel claims that there should be a public space for the citizenry in the administration of justice, alongside judges. In his view, it is important not only that justice be done, but that "citizens are thereby convinced that justice [*Recht*] is actually being done."¹⁸⁷ For this reason, the administration of justice must be public.¹⁸⁸ For Hegel, it was vital for the law to be known by the public as, in his view, the law somehow gives expression to a public conception of justice.¹⁸⁹ If the public were unaware of the demands of their laws, then there would be a chasm between them and law could make no claim to public justice.¹⁹⁰ However, this demand for law's publicity arises from the law's need for legitimacy.¹⁹¹ This too is only possible

183. *See id.* §§ 214R, 214A.

184. *Id.* § 214A.

185. *Id.* § 211A; *see also* KNOWLES, *supra* note 7, at 277.

186. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 219 (emphasis added). Moreover, the integrity of the legal system is in part dependent upon the virtue of judges: "the laws are administered by judges on whose rectitude and insight everything depends; for it is not the law which rules, but human beings who have to make it rule." HEGEL, POLITICAL WRITINGS, *supra* note 61, at 232.

187. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 224A.

188. *See id.* §§ 224A, 227. One highly unfortunate aspect of Hegel's position on the public administration of justice is that he believed people should pay money in order to bring their cases to trial. While he did not approve of the "exorbitant cost" when going to court, this would entail that persons in poverty are deprived of (equal) access to the courts and, it would appear, equal justice. *See generally id.* §§ 240-242; HEGEL, POLITICAL WRITINGS, *supra* note 61, at 24, 242. This would add a new worry to contemporary theorists concerned about the possibilities of those in poverty for freedom in Hegel's state.

189. *See* HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 211, 211R.

190. *See id.* §§ 215, 215R.

191. *See id.* § 215A.

when the citizenry actively recognise the law as something binding on them.¹⁹²

Hegel says:

How blind are those who like to believe that institutions, constitutions, and laws which no longer accord with men's customs, needs, and opinions, and from which the spirit has departed, can continue to exist, or that forms in which feeling and understanding no longer have an interest are powerful enough to furnish a lasting bond for a nation [*eines Volkes*].¹⁹³

Thus, whenever our institutions—including the administration of justice—fail to accord with the community's shared beliefs on justice, or with a Rousseau-like general will, these institutions lose their legitimacy.¹⁹⁴ This public legitimacy is not majority-based, but has an “organic quality.”¹⁹⁵ As a further illustration, Hegel says that von Haller was “an enemy of *legal codes* [*Gesetzbüchern*]” because he allegedly thought that legal knowledge could rightly be known by a few and used against the many.¹⁹⁶ Thus, all legal systems must be accessible to the public, although the contents of such systems are determined by majority vote.¹⁹⁷

192. See STEPHEN HOULGATE, FREEDOM, TRUTH, AND HISTORY: AN INTRODUCTION TO HEGEL'S PHILOSOPHY 101 (1991).

[T]he laws and customs which set out the duties of ethical consciousness do not constitute an alien authority to which consciousness must submit itself. Rather, they are recognised by the ethical individual to be institutional structures and practices in which and through which his or her *own* interests as a free being are actually articulated and fulfilled.

Id.

193. HEGEL, POLITICAL WRITINGS, *supra* note 61, at 2.

194. See MARK TUNICK, HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT 96-97 (1992); see also Gopal Sreenivasan, *What is the General Will?* 109 PHIL. REV. 545 (2000), reprinted in BROOKS, *supra* note 3, at 33-39 (discussing Rousseau's general will).

195. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, § 302R.

196. *Id.* § 258R.

197. See *id.* § 215.

B. *The Jury Trial*

One way in which the law could be known by the many is by using juries composed of non-legal professionals in the courtroom. In Hegel's view, jury trials are necessary because without them,

knowledge [*Kenntnis*] of right and of the course of court proceedings, as well as the ability to pursue one's rights, may become the *property* of a class [*Stand*] which makes itself exclusive . . . by the terminology it uses, inasmuch as this terminology is a foreign language for those whose rights are at stake.¹⁹⁸

Juries thus help ensure that when citizens are on trial the proceedings of the court are reasonably capable of being ascertained. When the jury decides upon a verdict, the defendant may well disagree with the jury. However, the defendant should be able to have some inkling of how the jury came to a different view after the trial.¹⁹⁹

C. *Judges and the Community's Shared Sense of Justice*

Like Hegel, Dworkin also claims that as the positive law progressively develops towards unity with justice, the sense of justice developed springs from the substantive morality of a community.²⁰⁰ Moreover, this progression expresses a general will that is perhaps more responsive in a way that Hegel's theory does not aspire to, at least with regard to voting privileges. Thus, Dworkin shares with Hegel a curious view of how law and public legitimacy intersect in

198. *Id.* § 228R; see also *id.* §215A; HEGEL, POLITICAL WRITINGS, *supra* note 61, at 5; Thom Brooks, *The Future of the Right to Trial by Jury*, 44 PHIL. TODAY 2 (2003); Thom Brooks, *The Right to Trial by Jury*, 21 J. APP. PHIL. 197 (2004); Thom Brooks, *A Defence of Jury Nullification*, 10 RES PUBLICA 401 (2004).

199. Hegel believes that the jury determines guilt or innocence of the accused, but only the judge determines the penalties, if any. See HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 31, §§ 227A, 228, 228R.

200. This fact has led some legal theorists to complain that, in linking conventional morality with the development of law, Dworkin does little more than "muddy the waters that so many thinkers have labored long and hard to clear up." IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 213 (1980); see Mackie, *supra* note 13, at 169.

the common pursuit of implementing justice, although Dworkin is more self-conscious about modern scepticism of this position. In fact, Dworkin admits that the only possible substantive objection to his legal theory “is that it offends democracy.”²⁰¹ As one recent commentator put it: “A specter is haunting judicial review—the specter of the philosopher-king.”²⁰² This has posed a major problem for the positive reception of Dworkin’s (and Hegel’s) legal theory.

Dworkin’s response is to say that such a charge rests on an incorrect understanding of democracy. For example, Dworkin says that democracy is not merely first-past-the-post majoritarianism, but rather “*legitimate* majority rule.”²⁰³ What he endorses is a communal, rather than statistical, conception of democracy not entirely unlike Rousseau’s (and Hegel’s) idea of government by a general will.²⁰⁴ As this view of democracy is deeply unpopular at present, Dworkin shows a certain sensitivity to critics. For instance, he suspects his audience “may think the communal conception metaphysical and mysterious . . . [and] also think it dangerously totalitarian, and my reference to Rousseau would not have allayed that suspicion.”²⁰⁵ Yet, his communal conception of democracy is able to explain an intuition he believes we share: “that a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust.”²⁰⁶ That *only* this conception of community can do so is unclear and suspicious.

Nevertheless, it is not suggested here that Dworkin and Rousseau held something stronger than a similar notion of community. According to Richard Nordahl, one significant difference between

201. DWORKIN, *FREEDOM’S LAW*, *supra* note 2, at 15.

202. Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 *LAW & PHIL.* 247, 247 (2003).

203. Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 2 (emphasis added).

204. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 128; see generally DWORKIN, *A BILL OF RIGHTS FOR BRITAIN*, *supra* note 127, at 32-38; Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 4; Nordahl, *supra* note 3, at 317-46.

205. Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 4; see also DWORKIN, *FREEDOM’S LAW*, *supra* note 2, at 20; DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at 167-68; Eerik Lagerspetz, *Ronald Dworkin on Communities and Obligations: A Critical Comment*, 12 *RATION JURIS* 108 (1999) (discussing Dworkin’s view on political communities). Of course, Hegel’s political theory has often been accused of flirting with totalitarianism. See *supra* note 173 and accompanying text.

206. DWORKIN, *FREEDOM’S LAW*, *supra* note 2, at 25.

Dworkin and Rousseau is that, “For Rousseau[,] the general will can only be expressed through the votes of the citizens; legislators as legislators and judges as judges do not express the general will. In contrast, Dworkin’s “people” is the institutionalized community; its general will is expressed through the institutions, including the courts.”²⁰⁷ Instead, it might be thought that Dworkin’s view of community is closer to Hegel’s view, which recognizes that state institutions, not least the judiciary, give expression to a common will.²⁰⁸ It is striking that institutions play major instrumental roles in allowing the expression of a community’s shared notion of right, or justice.

Hegel also recognizes the important part judges play in the progressive development of law, calling the judge “the organ of the law [*Organ des Gesetzes*].”²⁰⁹ Similar language describes Dworkin’s ideal judge: “The judge is now an oracle for the values immanent in the legal system.”²¹⁰ For Dworkin—far more so than for Hegel—the courts play a particularly significant role.²¹¹ Dworkin claims that “law” is by its very nature argumentative.²¹² Importantly, what legal theorists and judges argue about is *justice*. What makes these arguments more valuable than debates in, for example, the legislature, is that in the judiciary all debates are debates over principles of justice.²¹³ The courts are insulated from lobbying and moneyed interests and, therefore, form a more perfect arena for the development of true justice.

Furthermore, when judges and others debate about the demands of justice this justice is not conjured out of thin air. As we saw earlier, law has a normative core which we develop immanently as we attempt to fill gaps in the legal web.²¹⁴ Yet, in addition, Dworkin agrees with Hegel that the normative core developed is not only

207. Nordahl, *supra* note 3, at 325.

208. See HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, §211R.

209. *Id.* § 226.

210. FREEMAN, *supra* note 9, at 90.

211. See DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at 11.

212. See *id.* at 13.

213. Theodore M. Bendit, *Modest Judicial Restraint*, 18 *LAW & PHIL.* 243, 262 (1999).

214. See *supra* Part III.

immanent in the existing positive law, but is also an expression of the community's conventional morality.²¹⁵ In this way, Dworkin's judges truly are leading their communities toward greater justice. In fact, Dworkin calls the community's conventional morality the third source of law.²¹⁶ Dworkin does not suppose judges deliberate over the relation between law and justice anywhere other than within their societies.²¹⁷

Judges maintain the link between law and the community's conventional morality by grounding their verdicts in debates over underlying principles of justice.²¹⁸ Against Dworkin's view, Joseph Raz argues that the existence of a "common morality" is little more than a myth.²¹⁹ Moreover, he claims,

Unfortunately, some judges like to claim that the values they endorse are not merely the values of some but embody the national consciousness This is perhaps harmless rhetoric if it is understood as such. Professor Dworkin, however, urges us to give literal interpretation to such pronouncements from the bench.²²⁰

To this, Dworkin replies:

Raz . . . misunderstands those judges who appeal to community morality, whom he accuses of propagating a harmful fiction. He fails to distinguish between two concepts of the moral standards of a community. That phrase may refer to a consensus of belief about a particular issue, as might be elicited by a Gallup poll. Or

215. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 90-91.

216. Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624, 635 (1963) [hereinafter Dworkin, *Judicial Discretion*].

217. See DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 88.

218. See Nordahl, *supra* note 3, at 325; Dworkin, *Constitutionalism and Democracy*, *supra* note 2, at 7.

219. Joseph Raz, *Legal Principles and the Limits of Law*, in COHEN, *supra* note 13, at 78.

220. *Id.*

it may refer to moral principles that underlie the community's institutions and laws²²¹

Indeed, for Dworkin, there is almost something magical taking place when judges render verdicts—especially so in controversial cases. The magic lives in the reasons judges give when deciding in favour of a particular verdict.²²² Of course, judges advance our knowledge of law by making explicit unarticulated points of the law's web.²²³ In addition, when judges present law in its most favorable light, they help bring the legal system more into accord with the underlying demands of justice.²²⁴

This last fact holds true even when verdicts are grossly unpopular. Dworkin claims that when a judge reaches an unpopular verdict, the judge is not prioritizing his own personal views on justice over the views of his community.²²⁵ Thus, like Hegel, Dworkin argues that judges should be forbidden from reading their own convictions into cases they decide.²²⁶ The problem, as Dworkin sees it, is that “the community's morality is inconsistent on this issue.”²²⁷ If the community's morality were consistent, the community would in all likelihood agree with the judge's verdict.²²⁸

221. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 79; *see id.* at 67, 105, 210.

222. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 280 (describing the judges adjudication of the rights of the parties concerned).

223. *Id.*

224. *Id.*

225. *See generally* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 81-130 (discussing the absence of the insertion of the judge's predilections in the process of deciding hard cases and overruling precedent).

226. DWORKIN, *FREEDOM'S LAW*, *supra* note 2, at 10; Dworkin, *Judicial Discretion*, *supra* note 216, at 634-35. Hegel criticizes the use of the laws of the Twelve Tables by the Roman Empire for leaving too much “to the arbitrary will of the judge.” HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, at 286; *see also* HUGH A. REYBURN, *THE ETHICAL THEORY OF HEGEL: A STUDY OF THE PHILOSOPHY OF RIGHT* 222 (1921).

227. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 27, at 126.

228. Here Dworkin takes a rather different position than Hegel. For Hegel, the worry is not “consistency” as such, but, rather, establishing proper institutional structures to organize best public deliberation and decision-making. *See, e.g.*, HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 31, § 290A. When these structures are in place, we can expect that certain conditions will be true: juries are best suited to determine guilt or innocence while judges are best suited to determine punishments, a monarch must be head of state and make all foreign policy decisions, etc. Institutional structures play a far less significant role in Dworkin's legal theory where he employs different justificatory sources. The author is grateful to Bob Stern for raising this point.

It is difficult to see how defensible this position is to hold. Firstly, Dworkin admits a general unpredictability with verdicts. He says:

Judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community. Of course lawyers may reasonably disagree about when that test is met, and very different, even contradictory, convictions might all pass the test.²²⁹

By Dworkin's own account, judges and lawyers (and legal theorists) may disagree on what justice demands in particular cases.²³⁰ Nor is this claim implausible. The problem is that if such legal professionals can disagree about the demands of justice—a justice arising from the greater community—perhaps we ought not always prioritize the views of the legal profession in this way, if there were an alternative body to which we could appeal that would perform this task much better.

Second, Dworkin presupposes a common morality can be found in our increasingly pluralistic world. As Stephanie Lewis argues:

Dworkin is not in business to exhibit the beliefs that people do in fact hold. He is doing jurisprudence, not moral anthropology. But it is important to realise that the truth of the rights thesis depends on the truth of these empirical claims. It relies on moral uniformity, in particular on uniform liberal democratic beliefs. The discovery that people do not in fact have these uniform background beliefs would pre-empt the rights thesis, and bankrupt Dworkin's theory of adjudication.²³¹

Of course, this problem is not specific to Dworkin's theory, as Hegel's theory too makes the claim that there is an identifiable and

229. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 2.

230. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 27, at 280-81.

231. Stephanie R. Lewis, *Adjudication and Fairness*, 61 *AUS. J. PHIL.* 160, 163 (1983); see C. L. Ten, *Moral Rights and Duties in Wicked Legal Systems*, 1 *UTILITAS* 135 (1989).

accessible public morality.²³² Nevertheless, the problem cuts to the heart of both of their theories. For either legal theory to be valid, there must be a “morality” or “normativity” that is shared by members of a community.²³³

While we may talk about various subgroups in society with shared values, this is not a feature of Hegel’s and Dworkin’s more organic and communal model of society. It is true, as Dworkin is quick to note, that “[m]oral diversity is sometimes exaggerated” and that there is a “degree of convergence over basic moral matters throughout history . . . both striking and predictable.”²³⁴ In addition, I would not argue that reasonable disagreements over justice are themselves a major crisis.²³⁵ Moral pluralism does pose a challenge to Hegel’s and Dworkin’s legal theories, however, as each theory requires that an identifiable, public, normative content guides the progressive development of positive law. If there is no identifiable normative content present that touches in some way all members of the community, then Hegel’s and Dworkin’s legal theories must overcome a major hurdle to their realization. Similarly, these legal theories are rendered highly problematic if, as Joseph Raz argues, not all legal systems recognize conventional morality as a source of positive law.²³⁶

Finally, a third problem with this view is that we may wonder if this use of conventional morality in legal development is not itself extra-legal after all.²³⁷ At first glance, this appears to be true.

232. For this reason, Engelhardt argues that Hegel’s understanding must be reinterpreted as pluralistic insofar as there is more than one “actual and necessary” variety of “ethical life [Sittlichkeit].” ENGELHARDT & PINKARD, *supra* note 7, at 217.

233. While Dworkin has not rescinded this position, it is more explicitly stated in his earlier work, such as *LAW’S EMPIRE*, where he tends to emphasize the different, albeit not incompatible, claim that “our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.” DWORKIN, *LAW’S EMPIRE*, *supra* note 1, at vii. Thanks to Ken Himma for alerting me to this point.

234. Dworkin, *Objectivity and Truth*, *supra* note 86, at 113.

235. Indeed, John Rawls persuasively argues that “reasonable pluralism” is an important aspect of an acceptable, constitutional democratic society. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765-66 (1997).

236. See Raz, *Legal Principles and the Limits of Law*, in COHEN, *supra* note 13, at 80.

237. The author is grateful to Leif Wenar for raising this point.

However, it is also worth citing at length Donald Regan's views on this problem. He says:

I have referred to Dworkin's conception of the common law as being based on fundamental moral principles, accessible to all. The reader may think that by introducing "fundamental moral principles" into the discourse without making clear just what I mean, I fudge deep and important questions. The reader is absolutely right. But the questions I fudge are questions on which Dworkin seems thoroughly ambivalent, and I propose to leave them, at least in this essay, just where he leaves them. If Dworkin is ambivalent, that is as much a sign of virtue as a defect. He is ambivalent largely because he is less inclined than his contemporaries to flinch and look away from the most difficult questions about the relation of law to morality, questions no one has yet produced satisfactory answers to.²³⁸

Indeed, Dworkin exhibits ambivalence in his discussion of how *precisely* conventional morality is incorporated into a judge's decision, such that the law immanently develops from internal moral principles that bring greater coherence to the legal system as a whole while filling any empty legal "gaps." Perhaps the subject matter does not naturally lend itself to a more precise explication. Or, maybe one can make this case better than Dworkin has here. I am inclined to think, to borrow Regan's words above, that Dworkin is skirting the important issue of how directly related law should be to conventional morality and how this relationship might function. If we are to be more persuaded by Dworkin's and Hegel's interpretivism as a plausible theory of law, then the theory's adherents must provide more specific answers to the many questions the theory raises.

238. Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, in COHEN, *supra* note 13, at 150.

CONCLUSION

This article has not tried to defend the claims of Hegel's and Dworkin's legal theories. Nor has it overlooked their many differences. Instead, the aim has been to demonstrate a link between the two theories that suggests these theories are part of a school of jurisprudence that could conceivably be called "legal interpretivism." What is most distinctive about this school is how it sits in between natural law and legal positivism by endorsing the distinction between law and justice, while denying that external standards are relevant to the study of law. This conclusion briefly highlights the general features of this school of thought.

Legal interpretivism holds that law's normative content is conceptually distinct from law and, thus, may be considered in an "extra-legal" sense. This normative content is developed in law and drives law's self-transformation into justice. A community enacts laws as determinations of justice: thus, all laws are implicitly normative. We make progress in developing law by improving the correspondence between our positive law and our conception of justice. This process takes place through an immanent development of law's normative content.

For interpretivists, the overall project of law's development is a task of making explicit unarticulated spaces between our positive laws. In this way, the law is a seamless web and in need of greater codification. By making these spaces known, we develop the community's shared notion of justice while leaving protected spaces for individual rights. Law is therefore essentially public and stemming from the people. State institutions play an instrumental role in allowing the expression of a community's shared notion of justice. This fact does not mandate democratically-elected legislatures to most influence law as a result. Interpretivists claim that judges can play a particularly important role insofar as they decide cases in favor of communal justice rather than personal conviction. Moreover, it is not a predictive theory. Instead, they view law's progress as embodying rational structures that justifiably restrict its future development. Dworkin's use of equal concern and respect is one

example of this. Finally, interpretivists allege that this grand picture of law should not be acceptable on account of its theoretical plausibility alone. Instead, they argue that this picture is in fact a new understanding of what it is that we already do.

It is clear that the general position here described is true of both Hegel's and Dworkin's legal theory. Furthermore, this position stands in stark contrast to other schools of legal thought with which they have been associated, including natural law, legal positivism, the historical school of law, Scandinavian realism, or the pure theory of law.²³⁹ Indeed, it should now be clear why legal theorists have had such a difficult time categorizing both Hegel's and Dworkin's legal theories: each is presenting a new, independent, and common perspective on law lying in a space somewhere in between natural law and legal positivism.

For this view to be accepted more widely beyond Hegel and Dworkin, future adherents may need to revise their general framework to be more accommodating of contemporary support of democracy as a primary tool of public legitimation. Alternatively, they must improve their explanation of how unelected judges can discern justice stemming from conventional morality better than the majority from whom conventional morality arises. Perhaps more troubling, they must make a better case for our ability—whether that of the public or the judge—to discern an identifiable morality in our increasingly pluralistic society. If this is not possible, adherents to this view may be forced to embrace a more pluralistic understanding of morality. If they should fail to embrace such a pluralistic understanding of morality, then contemporary theorists will look elsewhere to rival schools of legal thought to study law.

239. See generally FREEMAN, *supra* note 9, at 783-836 (expounding upon the historical school of law), 731-82 (discussing Scandinavian realism), 271-338 (discussing the pure theory of law).